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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

ASKIA SANKOFA ASHANTI,

Defendant and Appellant.

B302277

(Los Angeles County  
Super. Ct. No. BA118005)

APPEAL from an order of the Superior Court of Los Angeles  
County, William C. Ryan, Judge. Appeal dismissed.

Askia Sankofa Ashanti, in pro. per.; and Randall Conner,  
under appointment by the Court of Appeal, for Defendant and  
Appellant.

No appearance for Plaintiff and Respondent.

Askia Sankofa Ashanti appeals from an order denying his motion to recall his sentence and resentence him pursuant to Penal Code section 1170, subdivision (d). For the reasons explained below, we dismiss the appeal.

### **FACTUAL AND PROCEDURAL BACKGROUND**

In 1996, a jury convicted Ashanti of unlawfully taking or driving a motor vehicle (Veh. Code, § 10851, subd. (a)). He had previously been convicted of murder, rape, and sexual penetration by a foreign object. The trial court sentenced him under the “Three Strikes” law to 25 years to life. We affirmed the conviction and sentence in an unpublished opinion in June 1997. (*People v. Ashanti* (June 25, 1997, B102008).)<sup>1</sup>

On September 30, 2019, Ashanti filed a petition for recall of sentence and resentencing under Penal Code section 1170, subdivision (d).

On October 16, 2019, the trial court denied Ashanti’s petition on the grounds that (1) the court lacked authority to resentence Ashanti on its own motion because more than 120 days had passed since Ashanti was sentenced, and (2) neither the secretary of the California Department of Corrections and Rehabilitation (CDCR), the Board of Parole Hearings, nor the district attorney had requested resentencing.

Ashanti appealed.

Ashanti’s appellate counsel filed a brief raising no issues on appeal and requesting that we independently review the

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<sup>1</sup> In 2014, this court affirmed the denial of Ashanti’s petition for resentencing under Penal Code section 1170.126. (*People v. Ashanti* (Aug. 19, 2014, B249709) [nonpub. opn.].) Ashanti is the appellant in pending consolidated appeals from orders denying his petitions under Penal Code sections 1170.18 and 1170.95 (*People v. Ashanti* (B293276 & B297624, apps. pending).)

record pursuant to *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*) to determine if the lower court committed any error. Counsel sent a copy of the brief and the record to Ashanti and informed him that he may file a supplemental brief. On June 12, 2020, this court sent a letter to Ashanti informing him that he “may submit by brief or letter any grounds of appeal, contentions, or argument which appellant wishes this court to consider.”

On June 15, 2020, Ashanti filed a supplemental brief and an appendix of exhibits. In his supplemental brief, Ashanti contends that (1) he has met the criteria for a recall of his sentence under Penal Code section 1170, subdivision (d), and that the failure to recall his sentence violates the constitutional proscription against cruel and unusual punishment and his rights to due process and equal protection; and (2) the court should either strike one of his prior convictions and resentence him as a two-strike offender, or reduce his third strike offense to a misdemeanor. Ashanti also requests the appointment of counsel and orders to hold hearings with respect to his claims.<sup>2</sup>

## DISCUSSION

Because Ashanti’s appeal is not from his conviction, he is not entitled to our independent review of the record pursuant to *Wende* or its federal constitutional counterpart, *Anders v. State of California* (1967) 386 U.S. 738 (*Anders*). (See *People v. Kelly* (2006) 40 Cal.4th 106, 119 [“independent judicial review mandated by *Anders* . . . applies only to a defendant's first appeal as of right”]; *People v. Serrano* (2012) 211 Cal.App.4th 496, 503 (*Serrano*))

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<sup>2</sup> We have provided Ashanti with counsel on this appeal. His request for the appointment of counsel in his supplemental brief appears to be a request for counsel to represent him in the trial court.

[[w]here a defendant has been afforded all the constitutional protections of a first appeal of right . . . he is not entitled to *Anders/Wende* procedures in subsequent appeals”]; *Pennsylvania v. Finley* (1987) 481 U.S. 551, 559 [*Anders* does not apply beyond the first appeal of right].)<sup>3</sup> Even when *Wende* does not apply, however, an appellant in a criminal case has the right to file a supplemental brief—which Ashanti has done here—and to our review of his or her contentions. (See *Serrano, supra*, 211 Cal.App.4th at p. 503; cf. *Ben C., supra*, 40 Cal.4th at p. 544, fn. 6; *id.* at pp. 554–555 (dis. opn. of George, C. J.).)

Penal Code section 1170, subdivision (d)(1) provides in relevant part: “When a defendant . . . has been sentenced to be imprisoned in the state prison . . . and has been committed to the custody of the secretary [of the CDCR] . . . , the court may, within 120 days of the date of commitment on its own motion, or at any time upon the recommendation of the secretary [of the CDCR] or the Board of Parole Hearings in the case of state prison inmates, or the district attorney of the county in which the defendant was sentenced, recall the sentence and commitment previously ordered and resentence the defendant in the same manner as if he or she

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<sup>3</sup> Under *Serrano*, in a criminal appeal in which *Wende* does not apply, counsel who finds no arguable issues is still required to (1) inform the court that counsel has found no arguable issues to be pursued on appeal; (2) file a brief setting out the applicable facts; (3) provide a copy of the brief to appellant; and (4) inform the appellant of the right to file a supplemental brief. (*Serrano, supra*, 211 Cal.App.4th at p. 503, citing *Conservatorship of Ben C.* (2007) 40 Cal.4th 529, 544 (*Ben C.*)).

had not previously been sentenced, provided the new sentence, if any, is no greater than the initial sentence.”<sup>4</sup>

The power to recall a sentence and resentence under Penal Code section 1170, subdivision (d) may be exercised only upon the court’s own motion within the first 120 days of defendant’s prison commitment or, at any time, upon recommendation of the secretary of the CDCR, the Board of Parole Hearings, or the appropriate district attorney. (Pen. Code, § 1170, subd. (d); *Dix v. Superior Court* (1991) 53 Cal.3d 442, 456.) A defendant has no right to bring a motion under this section. (*People v. Loper* (2015) 60 Cal.4th 1155, 1165; *People v. Chlad* (1992) 6 Cal.App.4th 1719, 1725; *People v. Gainer* (1982) 133 Cal.App.3d 636, 641.) A defendant may, however, invite the court to make its own motion to recall the sentence within the first 120 days of the defendant’s commitment. (*People v. Loper, supra*, 60 Cal.4th at pp. 1166–1167.) After that 120-day period, however, the court has no jurisdiction to recall a sentence on its own motion or to act upon defendant’s invitation to do so. (*Id.* at p. 1165; *People v. Chlad, supra*, 6 Cal.App.4th at p. 1725.) Because of the absence of jurisdiction in that situation, a court’s order denying a defendant’s motion filed more than 120 days after his or her commitment is not appealable, and an appeal from such an order should be dismissed. (*People v. Loper, supra*, 60 Cal.4th at pp. 1165–1166; *People v. Chlad, supra*, 6 Cal.App.4th at pp. 1725, 1727; *People v. Gainer, supra*, 133 Cal.App.3d at pp. 641–642.)

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<sup>4</sup> Title 15 of the California Code of Regulations identifies various circumstances under which the secretary of the CDCR may recommend recall of a sentence and resentencing. (Cal. Code Regs., tit. 15, § 3076.1.) According to these regulations, “the [s]ecretary’s decision is final and not subject to administrative review.” (*Id.*, § 3076.1, subd. (e)(4).)

Here, Ashanti filed his motion long after the 120-day period within which the court could have recalled his sentence on its own motion. In the absence of a recommendation from a person or board statutorily authorized to recommend recall and resentencing, the court had no jurisdiction to grant defendant's motion, and its order denying the motion is not appealable. Under the authorities cited above, therefore, we are compelled to dismiss the appeal.

Regardless of whether *Wende* or *Serrano* applies, we are satisfied that Ashanti's counsel has fully complied with his responsibilities. (See *Wende, supra*, 25 Cal.3d at p. 441; *Serrano, supra*, 211 Cal.App.4th at p. 503.)

Based on our review of the record, the applicable law, and Ashanti's supplemental brief, we conclude there is no arguable issue and, for the reasons given above, dismiss the appeal.

#### **DISPOSITION**

The appeal is dismissed.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

BENDIX, J.

SINANIAN, J.\*

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\* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.